Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October term, 1999

IN THE MATTER OF: NOLA FAYE GEE,
Debtor

ANGELA ANGELO, Personal Representative of the
Estate of Nola Faye Gee, Debtor
Appellant

v.

DEBORAH GEE
Appellee

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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31 pp

TO THE HONORABLE JUDGES OF THE
UNITED STATES SUPREME COURT:

Angela Angelo, designated representative and Independent Administrator of the Estate of Nola Faye Gee and the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 9, 1999.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a bankruptcy judge has the discretion to dismiss a Chapter 7 case after the death of the debtor.

2. Whether the death of a debtor during the pendency of a Chapter 7 bankruptcy case constitutes "cause" sufficient for a bankruptcy court to dismiss the case on the grounds that creditors would be better off outside of bankruptcy.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The caption of the case in this court contains the names of all parties to the proceedings in the United States court of appeals for the Fifth Circuit.

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STATUTES

11 USC §707 (a):

> (a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including –
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) non-payment of any fees or charges required under chapter 123 of title 28; and
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee

RULES

Bankruptcy Rule 1016

> Death or incompetency of the debtor shall not abate a liquidation case under Chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner...as though the death or incompetency had not occurred.

MISCELLANEOUS

Senate Judiciary Committee comments to 11 U.S.C. §541:

Revision Notes and Legislative Reports

1978 Acts. This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property,

Bankruptcy Act §8 [section 26 of former Title 11] has been deleted as unnecessary. Once the estate is created, no interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from property of the estate or acquired by the debtor after the commencement of the case and not included as property of the estate will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue *in rem* with respect to property of the estate, and the discharge will apply *in personam* to relieve the debtor, and thus his probate representative of liability for dischargeable debts.

OPINIONS BELOW

The December 9, 1999 opinion of the Fifth Circuit Court of Appeals, whose judgment is herein sought to be reviewed is unpublished case number 99-50693, and is reprinted in the separate Appendix to this Petition, pp. 1-5. The prior opinion of the United States District Court for the Western District of Texas that was affirmed by the Fifth Circuit is unpublished case number A 99 CA 07455, entered on June 14, 1999, and is reprinted in the separate Appendix to this Petition, pp. 16-19. The United States District Court opinion affirmed the decision of the United States Bankruptcy Court for the Western District of Texas, unpublished case number 98-10929FM, entered on December 21, 1998, and is reprinted in the separate Appendix to this Petition, pp.6-15.

STATEMENT OF JURISDICTION

This is an appeal to the Fifth Circuit United States Court of Appeals of the Order entered in Case No. 99-CA-74 by the District Court for the Western District of Texas court on June 14, 1999. This court has jurisdiction to hear this appeal pursuant to 28 U.S.C. §1254 as a result of the Fifth Circuit's affirmation of the dismissal.

STATEMENT OF THE CASE

Creditor Deborah Gee moved for the dismissal pursuant to 11 U.S.C. §707(a) on the grounds that the debtor's death nullified the "fresh start" policies of Chapter 7, and that the continuance of this case was not in the best interests of the creditors of the bankruptcy estate.

This case was filed by debtor Nola Faye Gee as a Chapter 13 bankruptcy on March 17, 1998. On April 29, 1998, debtor voluntarily moved to convert the case to a chapter 7 liquidation. The case was converted to one under chapter 7 on May 1, 1998.

In schedules filed on April 2, 1998, Debtor scheduled as exempt homestead property a tract of rural property described as the Triple Creek Ranch. On May 12, 1998, debtor died. On May 21, Angela Angelo was designated as Debtor's personal representative in this case. On August 25, 1998, creditor Deborah Gee filed a motion to dismiss this case for cause. On September 9, 1998, the chapter 7 trustee filed a response opposing Deborah Gee's motion to dismiss, noting that debtor's personal representative had "cooperated in the administration of this bankruptcy estate." A hearing on the motion to dismiss was conducted on October 6, 1998. At the conclusion of the hearing, the Bankruptcy Court took the matter under advisement and the case was dismissed on December 14, 1998.

SUMMARY OF THE ARGUMENT

This case was dismissed for the sole reason that the Debtor died while the case was pending. The Bankruptcy Court's Amended Opinion and the District Court and the Fifth Circuit's affirmation thereof, attempt to avoid the unambiguous language of Rule 1016 by rationalizing that the dismissal was not granted due to the fact of the Debtor's death, but instead because continuance of the case would frustrate the law, as a deceased debtor cannot benefit from a chapter 7 "fresh start".

Bankruptcy Rule 1016 is unambiguous and mandatory: the death of the debtor *shall not* abate the case; the case *shall* be conducted in the same manner as though the death never occurred. In plain English, Rule 1016 instructs that the death of a chapter 7 debtor is not considered relevant to the progress or completion of the case. This result is compelled by the structure of chapter 7, where the debtor's control over the bankruptcy estate and its assets is fixed (and ended) at the moment the petition is filed.

Rule 1016 is derived almost verbatim from Section 8 of the former Bankruptcy Act of 1898, 11 U.S.C. §26, which provided, in part, that the death of the bankrupt "shall not abate the proceedings, but the same shall be construed and concluded in the same manner, so far as possible, as though he had not died." Section 8 of the Act applied to those bankruptcy cases where a trustee had taken possession and title of the Debtor's non-exempt assets. That situation is present in chapter 7 of the Code, where the trustee is vested with title to the debtor's non-exempt assets at the time the petition was filed. Under this scheme the death of a debtor should not influence the administration of a bankruptcy

proceeding. *In re Peterson,* 897 F.2d 935, 938 (8th Cir. 1990)

> That §8 of the Bankruptcy Act of 1898 was not brought forward into the Bankruptcy Code was no accident; rather it was embodied in new Bankruptcy Rule 1016. The legislative history of the current Bankruptcy Code is unambiguous that the law regarding death of a debtor was not changed by Congress's passage of the new law.

This confirms the position that the Eighth Circuit and other courts (including the United States Supreme Court) had held for more than eighty years. In *Shute v. Patterson,* 147 F. 509, 78 C.C.A. 75 (C.C.A. 8, Iowa, 1906) the Court found that the language of Section 8 left no doubt as to its construction. In holding that the case would not be dismissed, the Court stated:

> These provisions [of §8 of the Bankruptcy Act] plainly indicate that the proceedings in bankruptcy are deemed to be commenced when the petition is filed, and they do not abate with the death of the bankrupt. By the act of 1898 Congress went further than the English act of 1888, section 8 of which provides that if a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter, shall, unless the court otherwise orders, be continued as if he were alive. (citations omitted) It is the exclusive province of Congress to say when such a proceeding shall be deemed to be commenced and

> pending in a court of bankruptcy, and what effect thereon the subsequent death of the bankrupt shall have, and it does not appear that its purpose was left in doubt. *When the proceedings are once commenced the further continuance thereof after the death of the bankrupt is mandatory; it is not left to the discretion of the court.* (at p. 511, emphasis added)

Neither the moving creditor nor the Courts contended that this case could have been dismissed for cause had the debtor not died. Certainly none of the enumerated causes for dismissal under 11 U.S.C. §707(a) are alleged to be present in this case. The moving creditor admits in paragraph 1 of its motion to dismiss that debtor was insolvent as defined by the Bankruptcy Code. The Bankruptcy Court concedes in its Amended Opinion that debtor (and debtor's personal representative) turned over to the Trustee the non-exempt assets of the estate, including approximately $87,000.00 in cash and 14 acres of realty (estimated to be worth approximately $98,000) that were owned by the debtor on the petition date. Finally, the chapter 7 trustee admits in its Response to Motion to Dismiss that the debtor and debtor's probate estate cooperated in the administration of the bankruptcy case. Although it is true that the list of enumerated causes for dismissal under §707(a) is illustrative and not exclusive, the Court cannot circumvent legislative mandate by cloaking the dismissal in the garb of "cause". Stripped of rationalizations, this case can *only* have been dismissed because the Debtor died while the case pending.

REASON FOR GRANTING THE WRIT

Further, the Fifth Circuit's ruling is in conflict with a ruling by the Eighth Circuit Court of Appeals and the United States Supreme Court on the same important issue. The Courts below have entered judgments in conflict with another circuit on the same matter. The judgments are also in conflict with the law as interpreted by this Court.

Respectfully submitted,

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By: _____
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Attorneys for Petitioner

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October term, 1999

IN THE MATTER OF: NOLA FAYE GEE,
Debtor

ANGELA ANGELO, Personal Representative of the
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Appellant

v.

DEBORAH GEE
Appellee

ON PETITION FOR A WRIT OF CERTIORARI TO THE
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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-50693
Summary Calendar

In The Matter Of: NOLA FAYE GEE

Debtor

ANGELA ANGELO, Personal Representative of the Estate Of Nola Faye Gee, Debtor

Appellant

v.

DEBORAH GEE

Appellee

Appeal from the United States District Court
for the Western District of Texas
Docket No. A-99-CA-074-SS

Before KING, Chief Judge, and SMITH and EMILIO M. GARZA Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellant Angela Angelo seeks reversal of the district court's affirmance of the bankruptcy court's dismissal, under 11 U.S.C. § 707 (a), of debtor's Chapter 7 case. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Nola Gee ("Debtor") filed a Chapter 13 bankruptcy case on March 17, 1998. Debtor's largest asset was her homestead, a ranch that was valued at $380,300. Debtor elected that Texas state law be used to define her exempt property, and under that law, her ranch was exempt at the time of her filing. Her largest creditor was the estate of her ex-husband, the Honorable Thomas Gee, to which she claimed she owed $207,000 as a result of a lawsuit to enforce a divorce decree. That estate was administered by Deborah Gee, Judge Gee's widow. Debtor's Chapter 13 case was converted to a Chapter 7 case on May 1, 1998.

Debtor died May 12, 1998. Deborah Gee filed a motion to dismiss the bankruptcy case under 11 U.S.C. § 707(a) on August 28, 1998 to allow the distribution of assets to be handled entirely by the state probate court. Dismissal was sought because under Texas law, there is no homestead exemption when the sole homesteader dies without dependents or a spouse. See TEX. CONST. art. XVI, §§ 50, 51 (West 1998) ; TEX. PROP. CODE ANN. § 41.002(b)(1) (West 1998); Grey v. Longview Nat'l Bank, 161 S.W.2d 166, 166 (Tex. Civ. App. 1942, no writ) (holding that where no family member survives, the decedent's homestead is available to satisfy the claims of creditors). As a result, dismissal would make the homestead available to satisfy the Debtor's creditors. Continuation of the case, on the other hand, would cause the homestead to be included in the probate estate as a result of

it being an exempt asset at the time the bankruptcy petition was filed. This would leave only other non-exempt assets available to satisfy creditors.

A hearing on the matter was held October 6, 1998, and on December 14, the bankruptcy court granted Deborah Gee's motion. Weighing the equities of dismissal against retention of the case, the bankruptcy court determined that continuation of the case would cause Debtor's heirs to be placed ahead of creditors, and would not give the Debtor the benefit of a "fresh start" inasmuch as she had died. Dismissal, on the other hand, would benefit the creditors, and would result in Debtor's heirs receiving the assets that remained after creditors had been paid. The district court affirmed, holding that the bankruptcy court had not abused its discretion in dismissing the case. Angelo timely appeals.

II. DISCUSSION

Angelo argues that the district court erred in affirming the bankruptcy court's dismissal because the clear language of Bankruptcy Rule 1016 prohibits dismissal when a Chapter 7 debtor dies after filing a bankruptcy petition. Rule 1016 provides that "[d]eath or insanity of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or insanity had not occurred." Angelo points to the use of the word "shall" in the above, and argues that the provision is mandatory, i.e., the court shall not abate the case. The bankruptcy court's reliance on the notion that a dead person does not need a "'fresh start," Angelo urges, reads Rule 1016 out of existence.

We review the bankruptcy court's dismissal under 11 U.S.C. § 707(a) for abuse of discretion. See Peterson v. Atlas Supply Corp. (In re Atlas Supply Corp.), 857 F.2d 1061, 1063 (5th Cir. 1988). In order to find that the court abused its discretion, we must determine that its factual findings were clearly erroneous, or that it applied incorrect legal standards. See Latvian Shipping Co. v. Baltic Shipping Co., 99 F.3d 690, 692 (5th Cir.1996).

We agree with Angelo that in enacting the Bankruptcy Code of 1978, Congress contemplated that a Chapter 7 debtor's exempt assets would be transferred to her probate estate upon her death. See In re Gridley 131 B.R. 447, 450 (Bankr. S.D. 1991) (quoting a portion of the legislative history to 11 U.S.C. § 541). Rule 1016, promulgated by the Supreme Court under 28 U.S.C. § 2075, allows that result. At issue here, however, is whether Rule 1016 restricts creditors' use of provisions within the Bankruptcy Code to seek, and obtain, dismissal of a Chapter 7 case.

"As a general matter, the [Bankruptcy] Code defines the creation, alteration or elimination of substantive rights but the Bankruptcy Rules define the process by which these privileges may be effected." Hanover Indus. Mach. Co. v. American Can Co. (In re Hanover Indus. Mach. Co.), 61 B.R. SS1, SS2 (Bankr. E.D. Pa. 1986). Under 28 U.S.C. § 2075, the rules the Supreme Court was given the power to promulgate are not to "abridge, enlarge, or modify any substantive right." This would suggest that as a general matter, Rule 1016 cannot restrict the operation of the Code's provisions. Gridley, a case cited by Angelo in support

of her argument, also suggests that Rule 1016 does not restrict the application of other sections of the Bankruptcy Code. See 131 B.R. at 451-52 (considering whether a Chapter 7 case should be dismissed under 11 U.S.C. § 305 and finding that the facts of the case did not support dismissal). Nothing in § 707(a) indicates that the death of the debtor has the effect of restricting the provision's availability as a means of seeking and obtaining dismissal of a Chapter 7 case.

The language of Rule 1016 supports this interpretation. The Rule provides that the court administer and conclude the Chapter 7 case "in the same manner, so far as possible" as though the debtor's death had not occurred. This language suggests that the Code's provisions, including § 707(a), are to be applied as they otherwise would be. Rule 1016 also specifically contemplates courts considering the fact that the debtor has died after filing a petition. To suggest that courts must ignore the debtor's death entirely makes the Rule's phrase "so far as possible" meaningless. See In re Moss, 239 B.R. 537, 542 (Bankr. W.D. Mo. 1999).

For the above reasons, we do not find that the bankruptcy court misapplied the law. A review of the bankruptcy court's thorough opinion and of the facts of this case leads us to conclude that the bankruptcy court did not abuse its discretion in granting Deborah Gee's motion to dismiss the Debtor's Chapter 7 case under § 707(a). As a result, we AFFIRM.

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IN RE:	§	
	§	
NOLA FAYE GEE	§	CASE NO. 98-10929FM
	§	CHAPTER 7
Debtor	§	

AMENDED AND CORRECTED
MEMORANDUM OPINION

On October 6, 1998, a hearing was held on the Motion of Deborah Gee to Dismiss Case for Cause ("Motion"). After hearing the arguments of counsel, the Court took the Motion under advisement. Subsequent to the hearing the Court has reviewed the cases submitted by counsel and conducted its own independent legal research. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

FACTS

The Debtor filed for relief under Chapter 13 of the Bankruptcy Code on March 17, 1998. The First Meeting of Creditors was originally scheduled for April 29, 1998, but was never held because on that date the Debtor filed a Motion to Convert her case to Chapter 7. On May 1, 1998, the Order was entered converting this case to one under

Chapter 7. On May 12, 1998,the Debtor died. On May 20, 1998, counsel for the Debtor filed a Motion to Designate a Representative for the Deceased so that the § 341 Meeting could be conducted. That motion was granted on May 21, 1998, and the § 341 meeting was held on July 17, 1998. Schedule D filed by the Debtor reflects that there is one secured creditor, David Fowler, in the amount of $62,100.00 secured by a lien on the Debtor's homestead. There are 21 unsecured creditors in the amount of $315,355.00. All are credit card charges with the exception of the largest unsecured creditor, Deborah Gee, who is listed as a disputed, unliquidated creditor in the amount of $207,000. The Debtor, Nola Gee, was the former wife of the Hon. Thomas Gibbs Gee. Deborah Gee is Judge Gee's widow.

There is currently $86,852.27 in the estate in an interest bearing account. Also, the Trustee is currently marketing the non-exempt assets of the estate consisting of 14 acres in Hayes County, Texas, with an estimated value of between $3,800.00 and $5,000.00 per acre.

On August 3,1998, Deborah Gee, Individually and as Executrix for Judge Gee, filed a Complaint seeking a determination that a debt of $231,790.60 [based on a divorce agreement incorporated in a divorce decree rendered in the state of Texas on May 9, 1985] is non-dischargeable under 11 U.S.C. § 523(a)(15).

On August 28, 1998, Deborah Gee filed the instant Motion to Dismiss Case for Cause pursuant to 11 U.S.C. § 707(a). On September 10, 1998, the Chapter 7 Trustee filed a Response opposing the dismissal of the case. On September 15, 1998, the representative of the Debtor's probate estate filed a Response in opposition to dismissal. On October 6, 1998, First USA Bank and its affiliates, unsecured creditors in the amount of $13,318.00, filed a Supplement to Deborah Gee's Motion to Dismiss Case for

Cause in which they joined her in requesting dismissal of the bankruptcy case.

ISSUE

Should this bankruptcy case be dismissed for cause pursuant to 11 U.S.C. § 707(a)?

CONCLUSIONS OF LAW

This is primarily a contest between the heirs of the Debtor (from Judge Gee's former marriage to the Debtor) and Judge Gee's surviving widow (last marriage), who holds a substantial claim against the Debtor, over the assets of the deceased Debtor's estate. The extent to which either may recover is significantly impacted by whether or not this case is liquidated as a Chapter 7 bankruptcy case or dismissed to proceed in state probate court.

The dispute between these parties arose long before this bankruptcy case was filed. It originated with the divorce and the resultant property division between the now deceased Debtor and Judge Gee who pre-deceased her. Prior to the bankruptcy Judge Gee obtained a state court judgment on the property division against the Debtor. Deborah Gee is Judge Gee's executor, and heir. As such, she is by far the largest single creditor in the bankruptcy case.

If the Chapter 7 case remains, non-exempt assets of the estate could be liquidated to pay maybe 30¢ on the dollar. If the Chapter 7 case is dismissed and the matter handled in probate court, the homestead, which would not be exempt there, would also be used to pay creditors' claims. Therefore, in probate court, all creditors would be paid in full with over $200,000 remaining for the Debtor's heirs. This is because under Texas law the homestead

exemption lapses upon the death of an individual, if there is no surviving spouse and if there are no dependents. Tex. Const. art. XVI, §§ 50, 51 (Vernon 1998); Tex. Prop. Code Ann. § 41.002(b)(1) (Vernon 1998). See also, In re Cole 205 B.R. 382 (Bankr. E.D. Tex. 1997); In re Robinson, 180 B.R. 174 (Bankr. E.D. Tex. 1995); Grey v. Longview Nat. Bank 161 S.W.2d 166 (Tex. Civ. App.-Texarkana [6th Dist.]1942, no writ); Matter of Hill, 972 F.2d 116 5th Cir. 1992); In re Finkel, 151 B.R. 779 (Bankr. W.D. Tex. 1993); NCNB Texas Nat. Bank v. Carpenter, 849 S.W.2d 875 (Tex. App.-Fort Worth [2nd Dist.] 1993, no writ).

Under bankruptcy law, however, the homestead exemption is granted because it is determined on the petition date. Matter of Sandoval, 103 F3d 20, 23 (5th Cir. 1997), rehearing denied; In re Reed, 184 B.R. 733 (Bankr. W.D. Tex. 1995); In re Leonard 194 B.R. 807 (Bankr. N.D. Tex. 1996).

Deborah Gee argues that "cause" exists to dismiss the case because:

(1) The Debtor no longer has the need for a "fresh start" since she is now deceased;
(2) dismissal is in the "best interests" of creditors as they will recoup full payment in a probate administration, but only approximately 30¢ on the dollar in bankruptcy;
(3) failure to dismiss unjustly enriches the Debtor's heirs to the detriment of creditors; and,
(4) if dismissed the estate's assets can be just as effectively administered in probate court as they can be in bankruptcy court.

The Debtor, through her personal representative and heir, contends that Bankruptcy Rule 1016 is clear, unambiguous, and mandatory.

Bankruptcy Rule 1016 provides, in pertinent part, that

> "[d]eath or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred" (Emphasis added.)

Bankruptcy Rule 1016.

The argument is that death of a debtor is not alone sufficient cause to dismiss a case under 11 U.S.C. § 707(a). The Court agrees. One must look at the effect of dismissal versus the effect of not dismissing the case.

Mysteriously, the Trustee has joined with the Debtor's representative in opposing the dismissal of the case even though dismissal will result in full payment of all creditors.

First USA Bank, an unsecured creditor, has joined Deborah Gee in requesting dismissal of the case for the same reasons as set forth in the movant's pleadings.

So does Bankruptcy Rule preclude dismissal of the case? Does it mean that once a debtor has died[1], 11 U.S.C. § 707(a) can no longer be urged? Certainly not. Creditors should have the same right to argue § 707(a) after the Debtor has died as they did prior. After all, the rule only requires the case is to be administered and concluded in the same manner, so far as possible, as though the death had not occurred. Thus, for example, the Debtor's representative

---

[1] since incompetency of this Debtor is not relevant here, the court will limit it's discussion solely to the issue of the death of the Debtor.

was permitted to appear in this case on the Debtor's behalf at the §341 (a) meeting since the Debtor had died prior to the meeting being convened. Likewise, continuation of the case in the same manner also means that creditors should also be permitted to pursue their remedies, whether under § 707(a) or any other section, in the same manner that they could have prior to the death of the Debtor. The case simply continues to proceed under Chapter 7 with all relevant sections of the Bankruptcy Code still applicable regardless of the death of the Debtor. Further, a bankruptcy rule of procedure should not ordinarily be given greater weight than the statutory law to which it relates. Any conflicts or ambiguities should be resolved in favor of the statute and not the procedural rule. Bankruptcy Rule 1016 does not abrogate 11 U. S. C. § 707(a) which allows dismissal of a Chapter 7 case for cause.

In considering a motion to dismiss under § 707 the court must weigh the equities of dismissal versus retention of the case. In re Marra, 179 B.R. at 785, In re Cleland, 150 B. R. at 65. Dismissal is warranted only upon a showing of "cause". The Code does not define "cause". The legislative history, however, makes it clear that the enumerated subdivisions under the section are merely illustrative and are not exhaustive. See, H.R. Rep. No. 595, 95th Cong., 1st Sess. 380 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 94, (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5880, 6336. See also, In re Marra, 179 B.R. 782 (D.C.M.D. Pa. 782), In re Cleland 150 B.R. 63 (Bankr. Kan. 1992), In re Cecil, 71 B.R. 730 (Bankr. W.D. Va. 1987).

In addition, [s]ince equitable principles may be applied under the Bankruptcy Code, the decision of whether to grant a motion to dismiss a petition in bankruptcy lies within the discretion of the bankruptcy judge. Matter of Atlas Supply Corp.,857 F.2d 1061,1063(5th Cir. 1988). See also, In re Zick, 931 F.2d 1124,1126 (IP Cir. 1991).

There are several recent cases in which the courts have considered §707(a) motions with facts similar to this case.

In Cleland, supra, the deceased debtor had only one creditor. As in this case, the debtor's homestead exemption left the bankruptcy estate with insufficient funds to pay the sole creditor in full. The Chapter 7 trustee filed a Motion to Dismiss under § 707(a). He argued that the debtor had been single and had no dependents other than herself, the debtor had only one creditor, and that the legatee under the Will (the debtor's fiance) should not be granted the "fresh start" intended for the debtor. The court agreed and dismissed the case "since the objectives of bankruptcy law would not be met by continuing this case and the interests of the sole creditor would be best served by the dismissal." Cleland 150 B.R. at 65.

In Marra, supra, the heirs of the debtor/decedent were in a "bitter and protracted dispute with the debtor's ex-wife. The ex-wife's claims were based on the equitable division of marital property in the underlying divorce case. The bankruptcy court dismissed the case under § 707(a). That court considered the following factors as sufficient "cause" to dismiss: (1) the estate assets could be administered in state court probate proceedings, (2) the chapter 7 trustee was in favor of the dismissal, as long as his administrative costs and fees were recognized as charges against the estate, (3) the co-administrator of the probate estate supported the dismissal and he also had custody of the assets, and (4) "the bankruptcy concept of giving the debtor a 'fresh start' was meaningless where, as in this case, the Debtor is deceased." Marra 179 B.R. at 784.

On appeal the district court upheld the bankruptcy court's decision to dismiss. The district court noted that dismissal normally would be denied where it could be shown that creditors would be prejudiced thereby.

However, where dismissal was in the best interests of creditors, and the creditors consented, this would be a factor to consider in establishing good cause for dismissing the case. Other factors that supported the dismissal were that (1) the debtor/decedent's assets were sufficient to satisfy creditors' claims, (2) the assets were already being administered in probate court and the creditor had already filed a claim there, and (3) permitting the bankruptcy case to proceed "provided no benefit to the debtor and hampered the creditor's collection efforts in state court." Marra 179 B.R. at 786. The district court also noted that the matter involved essentially probate issues, not bankruptcy ones and, perhaps more importantly, the district court focused on the fact that an heir did not have a "claim" against the debtor's estate and, thus, had no right to share in the estate assets on a pro rata basis with unsecureds. As such, the heirs were not 'legitimate creditors' of the bankruptcy estate. The court stated,

> "(a)ccordingly, the Kennedys' objection to the dismissal of the Chapter 7 case was not entitled to much weight, if any. To hold otherwise would mean that a decedents heir could use bankruptcy proceedings to obtain the 'fresh start' that was intended for the benefit of the debtor. Once the Debtor/Decedent's creditors receive their shares of his estate, the Kennedys will be entitled to any remaining funds. But the Kennedys, as legatees under the Debtor/Decedent's will, should not be given the 'fresh start' clearly intended for the Debtor."

Marra 179 B.R. 7876.

The instant case should fall under the same rule. The heirs oppose the dismissal of this bankruptcy case

because they'll get more money since the homestead will be exempt from the creditor claims. The creditors want the case dismissed since under state law the exemption expires on death and they will be paid in full.

Bankruptcy laws should not be interpreted to frustrate state law when there is no legitimate "bankruptcy" purpose being served. To put heirs ahead of creditors stands state law on its head when there is no legitimate bankruptcy purpose for doing so: to wit, the Debtor is dead and cannot benefit from a Chapter 7 "fresh start". A "fresh start" should not be granted to non-debtors, i.e. heirs; it should be reserved for the living debtor.

The Chapter 7 Trustee opposes the dismissal on the basis that he is currently marketing non-exempt assets. However, permission to hire a real estate agent was only granted on November 16, 1998, after the Court had held the hearing on this Motion and took the matter under advisement. The Trustee's opposition to dismissal is not sufficient reason deny the dismissal when quite clearly the financial interests of creditors are better served proceeding in state probate court rather than here. Further, marketing the real property can be just as easily accomplished in the probate court.

Creditors have consented to dismissal. Although the administrator of the probate estate does not favor dismissal, there is no surviving spouse and no dependent children to protect. Administration of the Debtor's assets in the probate court will pay all creditors in full, with over $200,000 remaining for heirs. As such, to allow the interests of heirs to a probate estate to supercede the interests of creditors makes no sense. It violates the distribution scheme set forth under state law. And no bankruptcy law purpose would be furthered. There's simply no good reason not to dismiss the case.

For the foregoing reasons, this bankruptcy case should be dismissed for "cause" pursuant to 11 U.S.C. § 707 (a).

An Order of even date herewith will be entered in accordance with this Court's Memorandum Opinion.

DATED: December 21,1998.

FRANK R. MONROE
U.S. Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

In the Matter of	§	
NOLA FAYE GEE,	§	NO. A 99 CA 074 SS
Appellant	§	
	§	

ORDER

BE IT REMEMBERED that on the 14th-day of June 1999, the Court reviewed the file in the above-styled cause and specifically the appellate briefs in this bankruptcy appeal. This appeal deals with United States Bankruptcy Judge for the Western District of Texas, Austin Division, Judge Frank Monroe's order of December 14, 1998 dismissing this bankruptcy case under 11 U.S.C. § 707(a). As the appellant correctly points out, the standard of review for such an order of dismissal is abuse of discretion. *See In re Atlas Supply Corp.* 857 F.2d 1061, 1063 (5th Cir. 1988). An abuse of discretion occurs when a court's holding is based on an erroneous interpretation of the law. *Resolution Trust Corp. v. Bright,* 6 F.3d 336, 340 (5th Cir. 1995). After review of the briefs, the case file, and the applicable law, the Court finds no abuse of discretion and accordingly enters the following order affirming the order of the bankruptcy court.

This dispute is essentially between the deceased Honorable Thomas Gee's widow and his former wife's heirs. Judge Gee's former wife, Nola Gee, filed for Chapter 13 bankruptcy on March 17, 1998, and the proceeding was converted to a Chapter 7 bankruptcy on May 1, 1998. A primary creditor of Nola Gee's estate was the estate of the Honorable Thomas Gee, which was administered by his widow, Deborah Gee[21]. Nola Gee passed away on May 12,1998. Deborah Gee filed a motion to dismiss the bankruptcy case under 11 U.S.C. § 707(a) on August 28, 1998. The bankruptcy court held a hearing on October 6, 1998, and Judge Monroe entered his order dismissing the case on December 14, 1998. Judge Monroe entered a "Memorandum Opinion" on December 14, 1998 and an "Amended and Corrected Memorandum and Opinion" on December 21, 1998.

Nola Gee's heirs want the bankruptcy case to continue so they will benefit from the homestead exemption, which is established at the date of the filing for bankruptcy. *See In re Sandoval,* 103 F.3d 20, 23 (5th Cir. 1997). Deborah Gee wants the bankruptcy case dismissed because under Texas law, the homestead exemption does not apply when the sole homesteader dies without a spouse or dependents. *See, e.g., Grey v. Longview Nat'l Bank,* 161 S.W.2d 166,166 (Tex. Ct. App.-Texarkana 1942, no writ). Therefore, under Texas law, Deborah Gee and the other creditors would have the debts satisfied by the homestead and the estate's personal property; and under federal bankruptcy law, the creditors would not have access to the valuable homestead, which Nola Gee's heirs would inherit.

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[2] The creditors claimed over $315,000 total. $62,100 of the debt, owed to David Fowler, was secured on Nola Gee's homestead. The remainder of the debt was unsecured, with over $45,000 debt to various credit cards and $207,000 to Deborah Gee.

Judge Monroe dismissed this case pursuant to 11 U.S.C. § 707(a), which states: "The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including [three enumerated reasons that do not apply to this case]." it is undisputed Judge Monroe gave notice and held a hearing. Additionally, Judge Monroe explained the "cause" for dismissing the bankruptcy case, namely that there would "be no legitimate 'bankruptcy' purpose being served" in denying the motion for dismissal. Bankruptcy Amended Order of December 21, 1998, at 9. In this case, the creditors would be best protected by dismissing the bankruptcy. *Id* Continuing the bankruptcy case would not give a "fresh start" to the debtor, who is deceased. *Id.* Instead, it would allow the heirs of the debtor to manipulate bankruptcy law to prevent the creditors from receiving what is rightly theirs. *Id.* Hence, Judge Monroe clearly explained the "cause" for the dismissal required by Section 707(a).

Nevertheless, the appellant argues the case was wrongly dismissed under FED. R. BANKR. P. 1016, which states, "Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Judge Monroe did not rule that the death of the debtor "abated" the liquidation. Instead, the Judge evaluated the motion to dismiss "in the same manner, so far as possible, as though the death ... had not occurred." After this analysis, Judge Monroe determined dismissal for cause was appropriate under Section 707(a). Other courts have upheld the dismissal of Chapter 7 cases for cause following the death of the debtor. *See In re Marra,* 179 B.R. 782 (M.D. Pa. 1995); *In re Cleland, 150* B.R. 63 (Bankr. D. Kan. 1992).

The determination of "cause" justifying dismissal of a Chapter 7 case rests within the sound discretion of the trial court because "cause" is not defined in the statute. *See In re Eastman,* 188 B.R. 621 (B.A.P. 9th Cir. 1995); *In re Cecil,* 71 B.R. 730 (Bankr. W.D. Va. 1987). This Court finds no abuse of discretion in Judge Monroe's ruling of December 14, 1998 as explained by Judge Monroe's Amended Memorandum of December 21, 1998. Therefore, the ruling of the Bankruptcy Court will be affirmed.

In accordance with the foregoing, the Court enters the following order:

IT IS ORDERED that the Bankruptcy Court's ruling of December 14, 1998 dismissing this bankruptcy case for cause is AFFIRMED.

SIGNED this the 14th day of June 1999.

UNITED STATES DISTRICT JUDGE